HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	**225 of 2022**
Date of filing:	**04.03.2022**
Date of first hearing:	**26.04.2022**
Date of decision:	**26.04.2023**

Shikha Khurana W/o Sh. Arun Khurana,
R/o 305 , Sector-31,
Faridabad, Haryana- 121002

....COMPLAINANT(S)

VERSUS

BPTP Limited
M-11, Middle Circle, Connaught
Circus, New Delhi- 110001

....RESPONDENT(S)

CORAM: **Dr. Geeta Rathee Singh** **Member**
Nadim Akhtar **Member**

Present: - Mr. Nitin Kant Setia, Counsel for the complainant through VC.

Mr. Hemant Saini, Counsel for the respondent.

ORDER (DR. GEETA RATHEE SINGH - MEMBER)

1. Present complaint dated 04.03.2022 has been filed by complainant under Section 31 of The Real Estate (Regulation & Development) Act,

2016 (for short Act of 2016) read with Rule 28 of The Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

A. UNIT AND PROJECT RELATED DETAILS

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following table:

S.No.	Particulars	Details
1.	Name of the project	Park Elite Floors, Parklands Faridabad.
2.	RERA registered/not registered	Not registered
3.	Unit no.	H-4-08-SF
4.	Unit area	1022 square ft (Super Area)
5.	Date of allotment	24.12.2009
6.	Date of builder buyer agreement	07.10.2010
7.	Due date of offer of possession (24 months)	07.10.2012 (grace period of 6 months is not included)
8.	Possession clause in BBA (clause 4.1)	Subject to Clause 13 herein or any other circumstances not anticipated and beyond the control of the seller/ confirming party or any restraints/restrictions from any

		courts/authorities but subject to the purchasers) having complied with all the terms and conditions of this Agreement and not being if default under any of the provisions of this Agreement including but not limited to timely payment of Total Sale Consideration and other charges and having complied with all provisions,formalities,documentations etc., as prescribed by the Seller Confirming Party whether under this Agreement or otherwise from time to time, the Seller/Confirming Party proposes to offer the handing over the physical possession of Floor to the Purchaser(s) within a period of twenty four (24) months from the date of execution of floor buyer agreement or on completion of 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser(s), whichever is later. The Purchaser(s) agrees and understands that the Seller/ Confirming Party shall be entitled to a grace period of (180) one hundred and eighty days, after the expiry of thirty (24) months, for filing and pursuing the grant of an occupation certificate from the concerned authority with respect to the plot on which the floor is situated. The Seller/Confirming Party shall give a Notice of Possession to the Purchasers with regard to the handing over of possession and the event the purchaser(s) fails to accept and take the possession of the said floor within 30 days thereof, the purchaser(s) shall be deemed to be custodian of the said floor from the date indicated in the notice of possession and the said floor shall remain at the risk and cost

		of the purchaser(s).
9.	Basic sale price	₹ 20,55,999/-
10.	Amount paid by complainant	₹ 23,41,804.23/-
11.	Offer of possession	No offer

B. FACTS OF THE COMPLAINT

3. Facts of complaint are that complainant in the year 2009 applied for booking the floor in the real estate project named "Park Elite Floors", Faridabad by paying Rs. 2,50,000/- on 09.06.2009, following which complainant was allotted unit no. H-4-08-SF having area of 1022 sq. ft. on 24.12.2009.

4. That an amount of Rs 7,47,400/- has already been received by the respondent before issuance of allotment letter dated 24.12.2009. It is stated that respondent at the time of allotment made a representation that unit would be ready within 24 months and would be delivered to the complainants within 24 months plus additional 6 months for obtaining occupation certificate. With the aforesaid understanding the contract came into existence between the parties and parties were bound to perform their part of the deal. Builder buyer agreement was supposed to be signed immediately but due to delay on part of the respondent, builder buyer agreement got signed between the parties on

07.10.2010 i.e. after a delay of 16 months from receiving the first payment towards basic sale price i.e. on 09.06.2009. It is submitted that builder buyer agreement was not executed between the parties till 07.10.2010 but the parties were acting and performing their part of the contract in the terms agreed between the parties at time of booking, making payments thereof and issuance of receipts from the side of respondent. The time began to run from the date of receipt of first payment by the respondent for the purpose of delivery of possession. In absence of any understanding between the parties, it was impossible for the respondent to demand money and it was impossible for the complainant to part with his money in pursuance of the demand raised from time to time.

5. That respondent played a mischief by collecting huge amount of Rs 7,47,400/- before the execution of BBA. Till that point of time complainant was put in a one-sided arbitrary BBA and complainant had no choice but to yield to the demands of the respondent by signing alleged one sided and arbitrary BBA having inequitable clauses. By signing said BBA the starting date which ought to have been date of booking for delivery of possession got arbitrarily pushed in terms of clause 4.1 stipulated in BBA i.e. 24+6 months which works out to 07.04.2013. Further it is stated that complainant had no say in drafting the standards buyer agreement and complainant was forced to sign

under duress and coercion that one-sided agreement as the respondent had by that time taken huge amount from the complainant. Further it has been submitted that clause 4.1 of the BBA related to delivery of possession ought to be declared as illegal to the extent it stipulates that delivery of possession will be 24 months after the date of execution of BBA and be substituted and read as 24 months from the date of booking as a concluded contract between the parties came into existence on the date of booking which works out to January,2012.

6. That an amount of Rs 23,41,804/- has already been paid against basic sale price of Rs 20,55,999/-. The possession of the unit has been delayed by a period of more than 10 years. The structure was raised in the year 2011 and it is lying as such from the last 10 years without any maintenance and respondent has abandoned the unit without any reason.

7. That the respondent had raised a demand of Rs 1,58,380/- on 11.08.2011 on account of increase in area from 1022 sq ft to 1160 sq ft. Said demand is illegal because neither there is any justification of increase of more than 10% area with the respondent nor there is any official document to show that increased area has been sanctioned by the competent authority. Respondent is liable to refund the said amount with adequate interest for using the said amount for more than 10 years.

8. That the respondent had raised demand towards EEDC on 24.05.2012 to the tune of Rs 97,829/- which was duly paid by the complainant. It is submitted that after expiry of deemed date of possession the complainant was not bound to pay any fresh demands on account of EEDC or any other statutory demands because if the builder had timely performed its part of the contract and handed over the possession in accordance with the promise made at the time of booking of the unit, the conveyance deeds would have been executed before the demands of EEDC could have been raised, therefore the respondent is liable to refund the said amount with interest.

9. That in case of delay in construction and development, the respondent had made the provision of only Rs 5 per sq of the super built up area per month as compensation to the purchaser in the BBA (clause 16.4) whereas in case of delay in payment of installments by complainant, it had provided for the delay penalty @ 18% interest compounded quarterly. The complainant is aggrieved by such unilateral construction of the agreement as Rs 5 per sq ft is 2-3% and is thus too less compared to the exorbitant 18% rate of interest.

10. It is further stated that till date, the respondent has neither provided possession of the flat nor refunded the deposited amount along with interest. Therefore, complainant is left with no other option but to approach this Authority. Hence the present complaint has been filed.

C. RELIEF SOUGHT

11. The complainant in her complaint has sought following reliefs:

i) Direct the respondent to handover possession of the unit H-4-08-SF admeasuring 1022 sq ft in H-block, BPTP Park Elite floors, Parklands Sector-84, Faridabad.

ii) Declare that the terms of the BBA are one-sided, prejudicial to the interest of the purchasers, arbitrary and biased and against the provisions of the Real Estate (Regulation and Development) Act,2016 and the Haryana State Real Estate (Regulation and Development) Rules, 2017.

iii) Direct the respondent to pay delay penalty in terms of Section 18 of the Act from the date of completion of two years and six months from the date of first receipt of money from the allottees.

iv) Declare that the amount collected towards increase in super area as illegal as there is no increase in the area from the one approved by the State Authorities and there is no approved revision in building plans thereafter from the competent authorities.

v) Direct the respondent to return the amount collected towards increase in super area for the reason that there was no increase in the area and no revised sanctioned plans showing increased area were ever supplied to the complainant.

vi) Direct the respondent to pay compensation to

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the tune of Rs. 5,00,000/- on account of mental agony and harassment.

vii) Direct the respondent to compensate the complainant for loss of life of building by 10 years as the construction of the unit was completed in the year 2011-12 and since then the unit is lying abandoned without any care or maintenance by the respondent.

viii) Any other relief which the applicant is entitled for under the Real Estate (Regulation & Development) Act,2016 and the Haryana State Real Estate (Regulation and Development) Rules, 2017.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

Learned counsel for the respondent filed detailed reply on 19.01.2023 pleading therein:

12. Since the unit in question is being constructed over plot area tentatively measuring 109.254 sq. mtrs. As per section 3(2)(a) of RERA Act, registration is not required for an area proposed to be developed that does not exceed 500 sq. meters

13. That builder buyer agreement with complainant was executed much prior coming into force of Real Estate (Regulation and Development) Act, 2016. (RERA Act in brief). Therefore, agreement executed prior to coming into force of the Act or prior to registration of project with RERA cannot be reopened.

14. Respondent has admitted allotment and execution of floor buyer agreement in favor of complainant. Payment of Rs. Rs 23,41,804/- has also been admitted by the respondent. It is stated that in terms of FBA dated 07.10.2010 respondent proposed to handover the possession of the unit within a period of 24 months from the execution of FBA or 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser(s), whichever is later along with a grace period of 180 days.

15. Construction of the project was going on in full swing but it got affected due to the circumstances beyond control of the respondent such as NGT order prohibiting construction activity, ban on construction by Supreme Court of India in M.C Mehta v. Union of India, ban by Environment Pollution (Prevention and Control) Authority and Covid-19 etc. As of today, construction work has been completed and occupation certificate has been received on 20.07.2022 annexed as Annexure R-15 and respondent is in process of offering possession of the unit to the complainant.

16. Regarding relief pertaining to refund of amount paid by complainant on ground of increased area, it is submitted that super area of the floor shall be subject to the change/amendment i.e. increase or decrease in terms of clause 2.4 of the BBA. Initially allotted area was tentative and the same was subject to change/alteration/modification/revision. In respect of demand of EEDC, it has been submitted that said

demand was raised by the respondent being a statutory demand and is passed onto the government authorities. Complainant is/was bound to remit the same and it was duly remitted without any protest.

17. Since the BBA constitutes the sole basis of subsisting relationship of parties, both the parties are lawfully bound to obey the terms and conditions enunciated therein. Respondent had raised each specific demand strictly in consonance with the payment plan opted and agreed at the stage of booking as well as within the ambit of the clauses agreed and accepted by the complainant at the time of execution of BBA. Complainant after thorough reading and understanding of the terms and conditions mentioned in BBA signed the agreement that too without any protest and demur.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENT

17. During oral arguments learned counsel for the complainant insisted upon possession of booked unit along with delay interest. He submitted that he is not pressing upon the relief clause no. (iv) and (v) with respect to increase in area and refund of amount of Rs 1,58,380/- paid in lieu of said increase. Learned counsel for the respondent reiterated arguments as were submitted in written statement. He offered to refund the paid amount along with 9% interest which was outrightly denied by ld. counsel for the complainant.

F. Findings on the objections raised by the respondent.

F.I Objection regarding execution of BBA prior to the coming into force of RERA Act,2016.

One of the averments of respondent is that provisions of the RERA Act of 2016 will not apply on the agreements executed prior to coming into force of RERA Act,2016. Accordingly, respondent has argued that relationship of builder and buyer in this case will be regulated by the agreement previously executed between them and the same cannot be examined under the provisions of RERA Act. In this regard, Authority observes that after coming into force the RERA Act, 2016, jurisdiction of the civil court is barred by Section 79 of the Act. Authority, however, is deciding disputes between builders and buyers strictly in accordance with terms of the provisions of flat-buyer agreements. After RERA Act of 2016 coming into force the terms of agreement are not re-written, the Act of 2016 only ensure that whatever were the obligations of the promoter as per agreement for sale, same may be fulfilled by the promoter within the stipulated time agreed upon between the parties. Issue regarding opening of agreements executed prior to coming into force of the RERA Act, 2016 was already dealt in detail by this Authority in complaint no. 113 of 2018 titled as **Madhu Sareen v/s BPTP Ltd** decided on 16.07.2018. Relevant part of the order is being reproduced below:

"The RERA Act nowhere provides, nor can it be so construed, that all previous agreements will be re-written after coming into force of RERA. Therefore, the provisions of the Act, the Rules and the Agreements have to be interpreted harmoniously. However, if the Act or the Rules provides for dealing with certain specific situation in a particular manner, then that situation will be dealt with in accordance with the Act and the Rules after the date of coming into force of the Act and the Rules. However, before the date of coming into force of the Act and the Rules, the provisions of the agreement shall remain applicable. Numerous provisions of the Act saves the provisions of the agreements made between the buyers and seller."

Further, as per recent judgement of Hon'ble Supreme court in Newtech Promoters and Developers Pvt. Ltd Civil Appeal no. 6745-6749 of 2021 it has already been held that the projects in which completion certificate has not been granted by the competent Authority, such projects are within the ambit of the definition of on-going projects and the provisions of the RERA Act,2016 shall be applicable to such real estate projects, furthermore, as per section 34(e) it is the function of the Authority to ensure compliance of obligation cast upon the promoters, the allottees and the real estate agents under this Act, and the rules and regulations made thereunder, therefore this

Authority has complete jurisdiction to entertain the captioned complaint.

Execution of builder buyer agreement is admitted by the respondent. Said builder buyer agreement is binding upon both the parties. As such, the respondent is under an obligation to hand over possession on the deemed date of possession as per agreement and in case, the respondent failed to offer possession on the deemed date of possession, the complainant is entitled to delay interest at prescribed rate u/s 18(1) of RERA Act.

F.II Objections raised by the respondent regarding force majeure conditions.

The obligation to deliver possession within a period of 24 months from builder buyer agreement was not fulfilled by respondent. There is delay on the part of the respondent and the various reasons given by the respondent such as the NGT order, Covid outbreak etc. are not convincing enough as the due date of possession was in the year 2012 and the NGT order referred by the respondent pertains to year 2016, therefore the respondent cannot be allowed to take advantage of the delay on his part by claiming the delay in statutory approvals/directions. As far as delay in construction due to outbreak of Covid-19 is concerned Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. vs Vedanta Ltd & Anr. bearing***

OMP (I) (Comm.) No. 88/2020 and I.A.s 3696-3697/2020 dated 29.05.2020 has observed that:

"69. *The past non-performance of the contractor cannot be condoned due to Covid-19 lockdown in March,2020 in India. The contractor was in breach since septemeber,2019. Opportunities were given to the contractor to cure the same repeatedly. Despite the same, the contractor could not complete the project. The outbreak of pandemic cannot be used as an excuse for non-performance of a contract for which the deadline was much before the outbreak itself.*

The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by September,2019 and is claiming the benefit of lockdown which came into effect on 23.03.2020, whereas the due date of handing over possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, Authority is of view that outbreak of pandemic cannot be used an excuse for non-performance of contract for which deadline was much before the outbreak itself. "

So, the plea of respondent to consider force majeure conditions towards delay caused in delivery of possession is without any basis and the same is rejected.

G. Findings on the relief sought by the complainant

G.I Direct the respondent to handover possession of booked unit alongwith delayed possession charges at the prescribed interest per annum from the date of completion of 2 years and 6 months from the date of first receipt of money from the allotee and to declare the terms of the BBA as one-sided, prejudicial to the interest of the purchasers, arbitrary and biased and against the provisions of the Real Estate (Regulation and Development) Act,2016 and the Haryana State Real Estate (Regulation and Development) Rules, 2017.

18. In the present complaint, the complainant intends to continue with the project and is seeking delayed possession charges as provided under the proviso to Section 18 (1) of the Act, Section 18 (1) proviso reads as under :-

"*18. (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building-*

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed".

19. Clause 4.1 of BBA provides for handing over of possession and is reproduced below:-

> *Subject to Clause 13 herein or any other circumstances not anticipated and beyond the control of the seller/ confirming party or any restraints/restrictions from any courts/authorities but subject to the purchasers) having complied with all the terms and conditions of this Agreement and not being if default under any of the provisions of this Agreement including but not limited to timely payment of Total Sale Consideration and other charges and having complied with all provisions,formalities,documentations etc., as prescribed by the Seller Confirming Party whether under this Agreement or otherwise from time to time, the Seller/Confirming Party proposes to offer the handing over the physical possession of Floor to the Purchaser(s) within a period of twenty four (24) months from the date of execution of floor buyer agreement or on completion of 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser(s), whichever is later. The Purchaser(s) agrees and understands that the Seller/ Confirming Party shall be entitled to a grace period of (180) one hundred and eighty days, after the expiry of thirty (24) months, for filing and pursuing the grant of an occupation certificate from the concerned*

authority with respect to the plot on which the floor is situated. The Seller/Confirming Party shall give a Notice of Possession to the Purchasers with regard to the handing over of possession and the event the purchaser(s) fails to accept and take the possession of the said floor within 30 days thereof, the purchaser(s) shall be deemed to be custodian of the said floor from the date indicated in the notice of possession and the said floor shall remain at the risk and cost of the purchaser(s).

20. It is the argument/plea of ld. counsel for complainant that delay interest be awarded to the complainant w.e.f 24 +6 months from date of booking (09.06.2009) which comes out to 09.12.2012 instead of clause 4.1 of the BBA for the reason that contract/agreement by way understating was already in existence between the parties for the delivery of possession of unit which in essence started from date of first payment towards sale consideration of unit i.e. date of booking 09.06.2009. Further, it has been argued that an amount of Rs 7,47,400/- were already received by the respondent out of total paid amount of Rs 23,41,804/- before the execution of BBA. After that builder buyer agreement was put for signatures of complainant and there was no say of complainant in drafting of said agreement so it was signed under duress and coercion. In rebuttal, ld. counsel for respondent submitted that builder buyer agreement was signed by complainant without any protest and similarly payments were also honored by complainant since 2009 without any objections. It is only at the time of filing of complaint that such sort of

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allegations/objections have been raised by complainant whereas no communication in this regard was ever sent by the complainant to the respondent till date. Arguments of both parties were heard meticulously. Perusal of file reveals that complainant had applied for booking of unit in project of respondent on 09.06.2009 by making payment of Rs 2,50,000/- and thereafter Rs 2,64,000/- was paid on 19.08.2009 in consonance with demand raised within 90 days of booking on account of 25% of basic sale price and Rs 2,33,400/- was paid on 19.10.2009 in consonance with demand raised within 150 days of booking on account of 10% of basic sale price +20% of EDC/IDC and payment of Rs 2,00,349/-was paid on 28.09.2010 in consonance with demand raised at the start of construction on account of 10% of basic sale price + 40% of preferential location charges + 20% EDC/IDC and then the builder buyer agreement was executed with the parties on 07.10.2010. Complainant had honored all these demands with consent to the respondent fully aware of the stage of progress for which each demand was raised. Act of payment by complainant and issuance of receipts by the respondent through which the complainant is claimed to have reached to an understanding vide which respondent received amount of Rs 7,47,400/- before execution of BBA and as per plea of complainant, said understating be deemed to be a contract w.e.f date of first payment rather than the actual

contract executed between the parties. It is observed that the series of positive acts performed by both the parties i.e. payment and its acceptance took the concrete shape only after execution of builder buyer agreement on 07.10.2010. Moreover, the demand letters which were honored by complainant to pay the amount mentioned aforesaid were in consonance with the payment plan annexed alongwith builder buyer agreement. Complainant's plea that builder buyer agreement was signed under duress and coercion is not supported with any documentary evidence. No communication or any objection either for the delayed executed of BBA i.e. after 16 months of booking or for receipt of amount of Rs 7,47,400/- before the execution of BBA has been placed on record. Reliance is placed upon the judgement dated 30.09.2021 passed by Hon'ble Supreme Court in **Civil Appeal no. 1491 of 2007 titled as Placido Francisco Pinto (D) By Lrs & Anr Vs Jose Francisco Pinto & Anr.**, relevant part of which is reproduced below for reference:-

"26. In Roop Kumar, this Court was seized of an appeal filed by the defendant arising out of a suit for possession and for rendition of accounts. The plaintiff claimed that he entered into an agency cum-deed of license with the appellant-defendant on 15.5.1975 and the terms of such agency-cum-licensing agreement was incorporated in an agreement dated 15.5.1975. The stand of the defendant was that he was in lawful possession as a tenant under the plaintiff. The trial court

decreed the suit holding that the transaction between the respondent and the appellant evidenced by an agreement dated 15.5.1975 amounts to license and not subletting. The question before the High Court was whether a relationship between the parties is that of a licensor and licensee or that of a lessor and lessee. The first appeal was dismissed. This Court held that it is general and most inflexible rule that in respect of written instruments, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It was held that in Section 92 of the Evidence Act, the legislature has prevented oral evidence from being adduced for the purpose of varying the contract, such contract can be proved by production of such writing. It was held that Section 91 is concerned with the 15 mode of proof of a document with limitation imposed by Section 92. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. This Court held as under:

"17. It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than oral evidence. It is of policy because it would be attended with great mischief if those instruments, upon

which men's rights depended, were liable to be impeached by loose collateral evidence.

18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

xx xx xx

21. The grounds of exclusion of extrinsic evidence are: (i) to admit inferior evidence when the law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and 16 final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.

22. This Court in Gangabai v. Chhabubai [(1982) 1 SCC 4 : AIR 1982 SC 20] and Ishwar Dass Jain v. Sohan Lal [(2000) 1 SCC 434 : AIR 2000 SC 426] with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought

to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties." (Emphasis Supplied)

27. A perusal of the above judgment would show that the oral evidence of a written agreement is excluded except when it is sought to be alleged the document as a sham transaction".

21. Fact remains that complainant and respondent with their mutual consent executed the builder buyer agreement on 07.10.2010. Complainant has not raised any objection to the execution of said builder buyer agreement till filing of present complaint nor has approached any other forum for redressal of her grievances. Since date of booking i.e 09.06.2009 complainant was silent about the alleged builder buyer agreement which was signed under coercion by her meaning thereby complainant herself accepted the said builder buyer agreement and made further payments also to respondent without any protest. Oral pleadings of the complainant cannot be relied upon without any documentary evidence over and above the duly executed builder buyer agreement dated 07.10.2010. Further, it is observed that builder buyer agreement is a core document for determining the rights and obligations of both the parties. An agreement duly executed by parties with their consent cannot be ignored in totality for declaring

the whole of document as arbitrary and unreasonable. However, a distinction can be made between the reasonable and unreasonable clauses of BBA for deciding the rights of the allotee in terms of the prevalent laws. In view of aforesaid discussion, the relief of awarding the delay interest from 24+6 months from date of first payment towards total sale consideration of unit and to declare the terms of the BBA as one-sided, prejudicial to the interest of the purchasers, arbitrary and biased is rejected. Reliance is placed upon the judgement dated 07.09.2022 passed by Hon'ble Supreme Court in **Special Leave Petition (Civil) no. 15989 of 2021 titled as Babanrao Rajaram Pund vs M/s Samarth Builders & Developers & Anr.**, relevant part of which is reproduced below for reference:-

"27.There is no gainsaying that it is the bounden duty of the parties to abide by the terms of the contract as they are sacrosanct in nature, in addition to, the agreement itself being a statement of commitment made by them at the time of signing the contract. The parties entered into the contract after knowing the full import of the arbitration clause and they cannot be permitted to deviate therefrom.

28.It is thus imperative upon the courts to give greater emphasis to the substance of the clause, predicated upon the evident intent and objectives of the parties to choose a specific form of dispute resolution to manage conflicts between them. The intention of the parties that flows from the substance of the Agreement to resolve their dispute by arbitration are to be given due weightage."

22. At the outset, it is relevant to comment with regard to clause of the agreement where the possession has been subjected to completion of

35% of basic sale price alonwgith 20% of EDC/IDC. The drafting of this clause is vague and uncertain and heavily loaded in favor of the promoter. Incorporation of such clause in the builder buyer agreement by the promoter is just to evade the liability towards timely delivery of unit and to deprive the allotee of his right accruing after delay in delivery possession.

23. **Finding w.r.t grace period**: The promoter had agreed to handover the possession of the within 24 months from the date of execution of floor buyer agreement or on completion of 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser(s), whichever is later. The agreement further provides that promoter shall be entitled to a grace period of 180 days after expiry of 24 months for filing and pursuing the grant of occupation certificate with respect to the plot on which the floor is situated. Since; the later milestone for possession i.e. completion of 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser is vague, ambiguous and arbitrary, the date of execution of floor buyer agreement is taken as the date for calculating the deemed date of possession. As a matter of fact, the promoter did not apply to the concerned Authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the respondent/promoter in the floor buyer agreement i.e immediately after completion of construction works within 24 months.

Thus, the period of 24 months expired on 07.10.2012. As per the settled principle no one can be allowed to take advantage of its own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter.

24. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:

> (za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
>
> Explanation.-For the purpose of this clause-
>
> (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
>
> (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

25. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

26. Taking the case from another angle, the complainant-allottee was entitled to the delayed, possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @18% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the Authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable, the promoter cannot be allowed to take undue advantage of his dominant position and to exploit the needs of the home buyers. This Authority is duty bound to take into consideration the legislative intent i.e. to protect the interest of the consumers /allottees in the real estate sector. The clauses of the buyer's agreement entered between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex- face one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding. In these

circumstances the complainant is entitled to interest at prescribed rate from the deemed date of possession till delivery of valid offer of possession.

27. Consequently, as per website of the State Bank of India ie. https://sbi.co.in, the highest marginal cost of lending rate (in short, MCLR) as on date i.e. 26.04.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

28. Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

> *"Rule 15. Prescribed rate of interest- (Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19] (1) For the purpose of proviso to section 12; section 18, and sub. sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%: Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public".*

29. The Authority observes that the respondent has failed to fulfil its obligation stipulated in BBA dated 07.10.2010. Due date of possession was 07.10.2012. Now, even after lapse of 10 years respondent has not offered possession of the unit though occupation certificate stands received on 20.07.2022. Fact remains that respondent in his written statement has not

specified as to when possession of booked unit will be offered to the complainant. Complainant however is interested in getting the possession of her apartment. She does not wish to withdraw from the project. In the circumstances, the provisions of Section 18 of the Act clearly come into play by virtue of which while exercising option of taking possession of the apartment the allottee can also demand, and respondent is liable to pay, monthly interest for the entire period of delay caused at the rates prescribed. The respondent in this case has not made any offer of possession to the complainant till date even after receipt of occupation certificate of the unit in question. So, the Authority hereby concludes that the complainant is entitled for the delay interest from the deemed date i.e., 07.10.2012 up to the date on which a valid offer is sent to her after supported with occupation certificate.

30. Authority has got calculated the interest on total paid amount from the deemed date of possession till the date of this order at the rate of 10.70% till and said amount works out to ₹ 26,42,663/- and monthly interest of Rs 20,595/- as per detail given in the table below:

Sr. No.	Principal Amount	Deemed date of possession or date of payment whichever is later	Interest Accrued till 26.04.2023
1.	2331645.74/-	07.10.2012	2634300/-
2.	10159/- amount taken from statement of	19.08.2015	8363/-

	accounts dated 19.08.2015		
	Total = ₹ 2341804.74/-		₹ 2642663/-
	Monthly interest		₹ 20595/-

31. Accordingly, the respondent is liable to pay the upfront delay interest of Rs. 2642663/- to the complainant towards delay already caused in handing over the possession. Further, on the entire amount of Rs. 2341804.74/- monthly interest of Rs. 20,595/- shall be payable up to the date of actual handing over of the possession after obtaining occupation certificate. The Authority orders that the complainant will remain liable to pay balance consideration amount to the respondent when an offer of possession is made to him.

32. The complainant is seeking compensation on account of mental agony, torture, harassment caused for delay in possession and loss of life of building. It is observed that Hon'ble Supreme Court of India in Civil Appeal Nos. 6745-6749 of 2027 titled as *"M/s Newtech Promoters and Developers PvL Ltd. V/s State of U.P. & ors."* (supra,), has held that an allottee is entitled to claim compensation & litigation charges under Sections 12, 14, 18 and Section 19 which is to be decided by the learned Adjudicating Officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the learned Adjudicating Officer having due regard to the factors mentioned in Section 72. The adjudicating officer has exclusive

jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the Adjudicating Officer for seeking the relief of litigation expenses.

I. DIRECTIONS OF THE AUTHORITY

33. Hence, the Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:

(i) Respondent is directed to pay upfront delay interest of Rs. 26,42,663/- to the complainant towards delay already caused in handing over the possession within 90 days from the date of this order. Further, on the entire amount of Rs. 2341804.74/- monthly interest of Rs. 20,595/- shall be payable by the respondent to the complainant up to the date of actual handing over of the possession after obtaining occupation certificate.

(ii) Complainant will remain liable to pay balance consideration amount to the respondent at the time of possession offered to her.

(iii) The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e, 10.70% by the respondent/ Promoter which is the same

rate of interest which the promoter shall be liable to pay to the allottees.

(iv) The respondent shall not charge anything from the complainant which is not part of the agreement to sell.

34. **Disposed of**. File be consigned to record room after uploading on the website of the Authority.

.....
NADIM AKHTAR
[MEMBER]

.....
DR. GEETA RATHEE SINGH
[MEMBER]